Supreme Court, U.S.
FILED
AUG 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-33

In The
Supreme Court of the United States
October Term, 1985

MARTHA HEWITT, et al.,
Petitioners,

vs.

CITY OF TRUTH OR CONSEQUENCES, et al.,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

SHAFFER, BUTT, THORNTON & BAEHR, P.C.
Paul Butt, Counsel of Record
Post Office Box 1370
Albuquerque, New Mexico 87109
(505) 884-0777
Attorneys for Respondents, Charlie Cox and Board of County Commissioners for the County of Sierra, New Mexico

CHERPELIS and ASSOCIATES, P.A.
George Cherpelis, Counsel of Record
4001 Indian School Rd. NE
Albuquerque, New Mexico
(505) 265-7825
Attorneys for Respondent, Henry Cruz

KELEHER & McLEOD, P.A.
Arthur O. Beach, Counsel of Record
Rebecca A. Houston
Post Office Drawer AA
Albuquerque, New Mexico 87103
(505) 842-6262
Attorneys for Respondents, City of Truth or Consequences, John Sawyer, Elfigo Armijo, John Sarember, Brack Callahan and Andy Garcia

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

17 pp

QUESTION PRESENTED

Whether the trial court's exclusion of evidence of allegedly negligent police actions in searching, handcuffing, securing and handling suspect, who escaped and was subsequently killed by an officer in self-defense, was contrary to the recent decision in *Tennessee v. Garner*.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Summary of Argument 6

Argument

Neither The Facts Nor The Rule Of Law At Issue Here Brings This Action Within The Ambit Of This Court's Decision In *Tennessee v. Garner*. 7

Conclusion 12

TABLE OF AUTHORITIES

Pages

CASES:

Salem v. United States Lines Co., 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962) 10

Tennessee v. Garner, 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1 (1985) 6, 7, 8, 9, 10, 11

United States v. Ashley, 555 F.2d 462 (5th Cir.) *cert. denied*, 434 U.S. 869, 98 S.Ct. 210, 54 L.Ed. 2d 147 (1977) 10

United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) 8

United States v. Robinson, 560 F.2d 507 (2nd Cir. 1977) 10

Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) 12

CONSTITUTION AND STATUTES:

U.S. Constitution Amendment IV 7, 8, 11

U.S. Constitution Amendment XIV 7, 11

42 U.S.C. § 1983 ..... 4, 6

STATEMENT OF THE CASE

This civil rights action arose out of the shooting death of Howard Hewitt, a suspected burglar who escaped from the custody of a Truth or Consequences, New Mexico police officer, Respondent Brack Callahan, by producing and then threatening to shoot himself with what appeared to be a pistol, and who subsequently was killed by Respondent John Sarember in self-defense.

The evidence at trial concerning the manner in which Hewitt was searched, handcuffed and secured in the police vehicle prior to his escape as well as the officers' verbal exchanges with Hewitt was accurately described in the opinion below from the Court of Appeals for the Tenth Circuit and will not be reiterated here. 758 F.2d 1375, 1377-78; Petition for Writ of Certiorari, Appendix, pp. 30-34. Petitioners' version of this evidence is presented in a fashion that is biased toward their position in this appeal.

After exiting from the police vehicle, in which he had been placed by Callahan, Hewitt backed across a parking lot, a city street and a portion of an undeveloped field containing scattered brushy trees. He was followed by Respondent Callahan and Respondent Henry Cruz, an off-duty reserve deputy sheriff. Both drew their handguns during the course of the pursuit when Hewitt lowered the weapon from under his chin to point it in their direction, then again pointed the pistol barrel to his chin.

Respondent Sarember, also a Truth or Consequences police officer, had assisted Callahan in investigating the suspected burglary, but had temporarily left the scene.

He returned to find the suspect backing across the street and into the field, pursued by Callahan and Cruz.

Sarember was concerned about Hewitt escaping in the field and possibly posing a threat to surrounding residents. He parked his vehicle adjacent to the field, headlights illuminating the suspect. Sarember exited the vehicle taking with him a shotgun, chambered a round and told Hewitt that the officers were through playing games. He pointed the shotgun at Hewitt and told him to drop the gun.

Hewitt turned directly toward Sarember in a semi-crouching position and aimed the pistol at him. Sarember testified that Hewitt looked directly at him as he aimed. Sarember fired, killing Hewitt. After Hewitt's death, the pistol he carried was found to have been a starter pistol.

At trial, Petitioners called as a police procedures expert Robert DiGrazia, who took issue with several aspects of the officers' search, handcuffing and securing of Hewitt, as well as their handling of him after he escaped from the vehicle. DiGrazia testified that the procedures used were "all basically correct, but as far as the thoroughness and the manner of doing it . . . improper."

DiGrazia's primary criticisms were that the pat-down searches of Hewitt must have been deficient, simply because the pistol was not found (it was theorized that the pistol was in Hewitt's boot); that Hewitt should have been handcuffed not only behind his back but also through the beltloops on his trousers so that he could not as easily maneuver his arms in front of his body; that the vehicle was either not properly altered to prevent escape, or the

door was not properly secured; and that the officers did not handle Hewitt properly as a potential suicide.

DiGrazia additionally testified that Sarember should not have left the cover of his vehicle, should not have carried the shotgun when he exited the car, as it would "distress" a potential suicide, and should not have fired at Hewitt even after he pointed the gun at Sarember. DiGrazia emphasized the fact that Sarember's headlights were pointed toward Hewitt, and theorized that Hewitt could not have seen Sarember, although Sarember was standing under a street light. He testified that Sarember should have ducked or moved to see whether Hewitt could really see him or was blinded by the lights, and if Hewitt tracked his movements with the gun or fired, then Sarember would have been justified in using deadly force.

Petitioners also tendered as an expert Dr. James Trost, a psychologist, who tesified out of the presence of the jury that the respondent officers failed to use crisis intervention techniques appropriate for someone threatening to commit suicide. Trost admitted, however, that Hewitt was probably aware that he could not have committed suicide with the starter pistol. The trial court refused to allow presentation of Trost's testimony to the jury on the grounds of relevancy, and on the basis that any relevancy the testimony might have had was outweighed by the potential confusion to the jury which would be created by injecting the issue of suicide prevention into the trial.

Following the close of all of the evidence, the trial court excluded and instructed the jury to disregard all evidence concerning the manner in which Hewitt was

searched and handcuffed, and all evidence concerning the condition of the police car in which he was placed after being apprehended. The Court's stated basis for this ruling was that these elements did not establish a prima facie case for recovery under 42 U.S.C. § 1983. The court ruled that negligence may have been demonstrated as to these aspects of the evidence, but that gross negligence or wantonness was required under the Fourteenth Amendment and 42 U.S.C. § 1983. Alternatively, the court ruled that any negligence in searching, handcuffing and securing Hewitt was not the proximate cause of his death, as a matter of law.

The court further instructed the jury that testimony concerning what one or more of the defendants may have told Hewitt during the incident should be considered only for the limited purpose of determining whether excessive force was used, and that the issue of whether the defendants used proper procedures for the management of a potential suicide was not before them.

The trial court submitted six special verdicts to the jury, posing specific questions regarding the use of force by defendants, all of which were answered unanimously and in a manner favorable to defendants. The verdicts were as follows:

Special Verdict #1

We, the jury, find that Defendant, Henry Cruz, *did not* use excessive force in the circumstances surrounding the incident wherein Howard Hewitt died on May 22, 1980.

Special Verdict #2

We, the jury, find that Defendant, Brack Callahan, *did not* use excessive force in the circumstances surrounding the incident wherein Howard Hewitt died on May 22, 1980.

Special Verdict #3

We, the jury, find that Defendant, John Sarember, *did not* use excessive force in the circumstances surrounding the incident wherein Howard Hewitt died on May 22, 1980.

Special Verdict #4

We, the jury, find that person [sic] in the position of Defendant, John Sarember, on May 22, 1980, *could* reasonably believe that Plaintiff's Exhibit 8B, the starter's pistol held by Howard Hewitt was a functional weapon which Howard Hewitt could use to seriously injure or kill him, Saremberr.

Special Verdict #5

We, the jury, find that Defendant, John Sarember, on May 22, 1980, when he shot Howard Hewitt, *did* believe that Plaintiff's Exhibit 8B, the starter's pistol held by Howard Hewitt, was a functional weapon which Howard Hewitt could use to seriously injure or kill him, Sarember.

Special Verdict #6

We, the jury, find that Howard Hewitt, immediately before he was shot by Sarember, *did* suddenly point Plaintiff's Exhibit 8B, the starter's pistol at Sarember as if preparing to shoot at Sarember.

Petitioners appealed from the Judgment in favor of Respondents in part on the grounds that the allegedly negligent search, handcuffing, securing and handling of Hewitt proximately caused the use of deadly force, and stated a separate claim for relief under the Fourteenth Amendment and 42 U.S.C. § 1983. The Court of Appeals for the Tenth Circuit, while holding that negligence may, in some circumstances, suffice to state a claim under the Civil Rights Act, found that the specific acts and omissions complained of did not "offend the principles of decency and justice embodied in the Due Process Clause." The Court therefore found no grounds for reversal in the trial court's refusal to submit the negligence claims to the jury or to allow evidence regarding those claims to be considered.

SUMMARY OF ARGUMENT

Petitioners' claim that the trial court's exclusion of the evidence relating to the search, handcuffing, securing and handling of Hewitt was contrary to the recent decision of *Tennessee v. Garner*, 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1 (1985). They argue that the "totality of the circumstances" which *Garner* dictates should be examined, necessarily required inclusion of this evidence.

Respondents assert that the facts presented in *Garner* are easily distinguishable from the instant situation, in which Petitioners' decedent was killed in self-defense. Further, the *Garner* case dealt with the competing interests to be balanced in determining whether a seizure was

reasonable under the Fourth Amendment, and did not address the admissibility of evidence, which is the controlling question on this appeal. Finally, as the Petitioners did not advise the trial court of their contention made herein, and raised only the issue of a Fourteenth Amendment deprivation to the Court of Appeals for the Tenth Circuit, this Court should not accept jurisdiction to review these issues for the first time.

ARGUMENT

Neither the facts nor the rule of law at issue here brings this action within the ambit of this Court's decision in Tennessee v. Garner.

Petitioners seek to invoke this Court's jurisdiction by claiming that the exclusion of certain evidence by the trial court, subsequently upheld by the Court of Appeals for the Tenth Circuit, was contrary to the decision of this Court in *Tennessee v. Garner,* 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1 (1985). A close reading of the *Garner* decision does not bear out Petitioners' contention, and therefore certiorari should not be granted in this action.

This case includes one element of superficial similarity to the facts underlying *Garner,* in that Petitioners' decedent was a suspected burglar who was shot while attempting to escape from a police officer. However, the pivotal facts of this case remove it from the ambit of *Garner.* Here the jury found that the officer shot Hewitt in self-defense, in the reasonable belief that he was about to be fired upon by Hewitt. In *Garner,* the police officer

had been exonerated based upon a Tennessee statute allowing the use of deadly force to stop a fleeing non-dangerous suspected felon. There was no contention, as there was here, that the officer was in reasonable fear of losing his life or suffering serious injury.

More importantly, however, the decision in *Garner* did not address the legal issue here—whether the Tenth Circuit correctly upheld the trial court's exclusion of the evidence concerning the search, handcuffing, securing and handling of Hewitt prior to and during his escape from custody. The *Garner* decision dealt with an alleged Fourth Amendment "seizure" through the use of deadly force. The precise issue posed was whether the Tennessee statute imposed a constitutionally unreasonable seizure when applied to allow the use of deadly force to apprehend a non-dangerous fleeing suspected felon.

Petitioners single out a single phrase — "totality of the circumstances" — from the *Garner* decision and twist it out of context to argue that the evidence excluded in this case should have been presented to the jury to determine if Hewitt's shooting constituted an "unreasonable seizure" under the Fourth Amendment. This interpretation of *Garner* is inappropriate.

The context in which the phrase "totality of the circumstances" is used in the *Garner* decision makes it clear that the phrase refers to the balancing process used to determine whether a particular seizure is constitutional. *Id.*, 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1, 8 (1985). The "circumstances" which are evaluated are the "nature and quality of the intrusion," which is weighed against the "importance of the governmental interests alleged to justify the intrusion." *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

Presumably, Petitioners contend that evidence regarding the search and other procedures surrounding Hewitt's initial detainment should have been considered as part of the "nature and quality of the intrusion." However, it is difficult to see how admission of the excluded evidence would have enhanced the severity of the intrusion complained of here.[1] Hewitt's death was, in a sense, the ultimate "seizure." As this Court pointed out in *Garner,* "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Tennessee v. Garner, supra,* 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1, 8 (1985).

Unlike *Garner,* however, where the only counterbalance to the suspect's fundamental interest in his own life was the governmental interest in effective law enforcement, the opposing interests here were considerably more substantial. Not only the interest in effective law enforcement, but also the interests of the officers in their own lives and personal safety, as well as the lives and personal safety of nearby residents were reasonably considered to be in the balance in the context in which Hewitt was killed.

This Court predicted the result of the balancing process here in the *Garner* decision when it held that "(w)here the officer has probable cause to believe that

---

[1] Indeed in urging the admissibility of this evidence, Petitioners anomalously must argue that the search and seizure of Hewitt's person should have been *more* rather than less intrusive. The excluded expert testimony was to the effect that the searches of Hewitt's person should have been more thorough, the handcuffing more restrictive, etc. Petitioners do not cite, and Respondents have not identified, any authority which implies the existence of a Fourth Amendment right to a more intrusive search and seizure than was performed.

the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* 471 U. S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1, 10 (1985). The jury's special verdicts firmly established the probable cause for Respondent Sarember's belief that he was compelled to fire upon Hewitt in self-defense. Admitting the evidence concerning the handling of Hewitt prior to his escape would not have altered the result of the balancing process sanctioned in *Garner.* Accordingly, any error in excluding this evidence was harmless, and review of this case should be denied.

Furthermore, *Garner* and its predecessor cases, while identifying the interests to be balanced in determining the validity of a search or seizure do not address the evidence admissible to establish those interests. Evidentiary decisions such as relevancy and the admissibility of expert testimony should be left to the broad discretion of the trial court, subject to review for abuse of that discretion. *Salem v. United States Lines Co.,* 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962); *United States v. Ashley,* 555 F.2d 462 (5th Cir.), *cert. denied,* 434 U.S. 869, 98 S.Ct. 210, 54 L.Ed.2d 147 (1977).

This deferral on appeal to the discretion of the trial court is based upon that court's unique advantage in being able to weigh "the intonation and demeanor of the witnesses . . ." and to "determine the emotional reaction of the jury to other pieces of evidence . . ." *United States v. Robinson,* 560 F.2d 507, 514-15 (2d Cir. 1977).

Here the trial court had the opportunity to hear and weigh the testimony of all of the witnesses, both expert and lay, as to the search, handcuffing, securing and han-

dling of Hewitt. The decision to exclude the testimony was made at the close of all of the evidence in the case. At that point, the trial court made the determination that the above evidence did not, standing alone, establish a constitutional deprivation, and that it was not relevant to the claim of excessive force that would be submitted to the jury.

The trial court's ruling was upheld by the Court of Appeals for the Tenth Circuit. This Court should decline to exercise its jurisdiction to review such an evidentiary issue, where decisions of this Court are not controlling and abuse of discretion does not appear evident from the ruling.

Finally, it should be pointed out that the issue raised by Petitioners before the Tenth Circuit was not an alleged Fourth Amendment unreasonable seizure, but rather an alleged deprivation of Hewitt's liberty interest without the due process guaranteed by the Fourteenth Amendment. As the Tenth Circuit noted in the course of its opinion, the Petitioners' Complaint originally claimed deprivations of Hewitt's Fourth, Fifth, Eighth, and Fourteenth Amendment rights arising out of his death, but only the Fourteenth Amendment claim was pursued on appeal. 758 F.2d 1375, 1377; Petition for Certiorari, Appendix, p.29.

The balancing process employed in the *Garner* case to analyze the Fourth Amendment claim is hardly a new one for this Court. *See* cases cited *Id.*, at 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1, 7-8 (1985). Yet Petitioners never raised this argument before the trial court or the Court of Appeals. As Petitioners failed to pursue a Fourth Amendment claim in the Courts below, this Court

should decline to accept review. *Youakim v. Miller,* 425 U.S. 231, 47 L.Ed.2d 701, 96 S.Ct. 1399 (1976).

CONCLUSION

Based upon the foregoing arguments and authorities, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals.

Respectfully submitted,

SHAFFER, BUTT, THORNTON & BAEHR, P.C.
PAUL BUTT, *Counsel of Record*
Post Office Box 1370
Albuquerque, New Mexico 87109
Attorneys for Respondents Charlie Cox and Board of County Commissioners for the County of Sierra, New Mexico

CHERPELIS AND ASSOCIATES, P.A.
George Cherpelis, Counsel of Record
4001 Indian School Rd. NE
Albuquerque, New Mexico
Attorneys for Respondent, Henry Cruz

KELEHER & MCLEOD, P.A.
ARTHUR O. BEACH, *Counsel of Record*
REBECCA A. HOUSTON
Post Office Drawer AA
Albuquerque, New Mexico 87103
Attorneys for Respondents City of Truth or Consequences John Sawyer, Elfigo Armijo, John Sarember, Brack Callahan and Andy Garcia